

No. 13153

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

HENRY S. WAECHTER, HAZEL MILLER and
WILLIAM T. WAECHTER, Co-Executors of
the Estate of May Florence Waechter, De-
ceased,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington
Northern Division.

FILED

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PAUL P. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

J. CHARLES DENNIS,

Attorney for Appellant,

1017 U. S. Court House,

Seattle 4, Washington.

THOMAS R. WINTER,

Attorney for Appellant,

713 Smith Tower,

Seattle 4, Washington.

EGGERMAN, ROSLING & WILLIAMS, and

JOSEPH J. LANZA,

Attorneys for Appellees,

918 Joseph Vance Building,

Seattle 1, Washington.

In the United States District Court for the Western
District of Washington, Northern Division

No. 2513

HENRY S. WAECHTER, HAZEL MILLER and
WILLIAM T. WAECHTER, Co-Executors of
the Estate of MAY FLORENCE WAECH-
TER, Deceased,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

For cause of action, plaintiffs allege:

I.

That plaintiffs are now and at all times herein-
after mentioned, were the duly appointed, acting
and qualified executors of the estate of May Flor-
ence Waechter, deceased, and are residents in the
Western judicial district of the State of Washing-
ton.

II.

That this is a civil action against the United
States of America for the recovery of internal reve-
nue taxes which have been erroneously and illegally
assessed and collected as an estate tax by the Col-
lector of Internal Revenue at Tacoma, Washington;
that the amount of claim involved herein does not
exceed \$10,000.00; and this Court has jurisdiction

of the subject matter of this action under Judicial Code Section 24, as Amended, and U.S.C.A. Title 28, §1340 and 1346.

III.

The death of May Florence Waechter occurred on February 20, 1947, while she was a resident of Seattle, King County, Washington.

IV.

Plaintiffs were appointed co-executors of the Will and estate of said May Florence Waechter by order entered on the 4th day of April, 1947, by the Superior Court of the State of Washington in and for King County; and at all times since have continued to be and act as the fully authorized executors of the said Will and estate.

V.

On March 19, 1948, plaintiffs acting as such executors, filed with the Collector of Internal Revenue, at Tacoma, Washington, the estate tax return on behalf of said estate of May Florence Waechter, deceased. That there was included in said return as part of the gross estate of decedent one-half the cash surrender value of the following insurance policies which were all carried upon the life of Henry Waechter, the surviving spouse, and are identified as follows:

Amount of Policy	Name of Company	No. of Policy	Date of Policy	Beneficiary	Cash Value as of 2/20/47
\$ 3,000.00	Equitable Life Co.	1196536	1/14/03	May F. Waechter if living, but if not, to William G. Waech- ter and Hazel B. Miller equally, or survivor, and should neither survive, to assured's estate	\$ 2,420.00
\$25,000.00	New York Life Co.	6320634	8/ 6/18	May F. Waechter and after death to Hazel B. Miller and Gerry Waechter, share and share alike, or survivor.....	\$15,244.75
\$ 4,000.00	Equitable Life Co.	1337670	5/11/04	May F. Waechter or estate of insured....	\$ 3,620.00
Total Cash Surrender Value.....					\$21,284.75

VI.

Said policies were taken out during the married life of the insured and decedent, and all premiums thereon were paid entirely from community funds down to the date of Mrs. Waechter's death, and on that date the policies were in full force and effect. None of the policies have been surrendered and none of the beneficiaries of decedent's estate or the surviving spouse have received any payments on account of the cash surrender value thereof at the date of decedent's death. Said insurance was not on the life of the decedent wife, and since none of the amounts here involved have been received by the executors or any heir or beneficiary of the decedent, no part of the cash surrender value thereof is includable as part of the gross estate of decedent for federal estate tax purposes.

VII.

By including one-half of the cash surrender value of said policies as part of the gross estate of decedent, the total tax assessed amounted to \$2,530.60 to which there was added and collected \$110.58 on account of interest, making a total of \$2,641.24 which was paid by the executors herein. By excluding one-half of the cash surrender value of said policies amounting to \$10,642.38 the correct tax should have been \$1,160.57 plus interest of \$21.34 making a total of \$1,181.91. That the difference between the amount paid and the correct amount of the tax is \$1,459.33.

VIII.

On August 24, 1949, plaintiffs, as such executors, filed with the Collector of Internal Revenue at Tacoma, Washington, their claim for refund of the portion of the tax so paid, and a copy of said claim is attached hereto marked Exhibit A and by this reference made a part hereof as if fully set forth herein.

IX.

That although more than six months have fully elapsed since the filing of said claim for refund, the Commissioner of Internal Revenue has neither allowed or disallowed said claim, although under date of March 2nd, 1950, the Internal Revenue Agent in charge at Seattle, Washington, notified plaintiffs, in writing, that a recommendation would be made to the Commissioner of Internal Revenue that said claim be disallowed.

X.

Plaintiffs herein incorporate by reference, as part of this complaint, each and every ground asserted in the attached claim for refund, and make the same a part of this complaint, as if repeated in full herein.

Wherefore, plaintiffs pray for judgment against defendant in the sum of \$1,459.33 together with interest thereon at the rate of 6% per annum from the date of the overpayment herein made which occurred on July 13, 1949, together with their costs and disbursements herein to be taxed.

EGGERMAN, ROSLING,
WILLIAMS,
/s/ JOSEPH J. LANZA,
Attorneys for Plaintiff.

EXHIBIT A

Form 843

Treasury Department

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Collectors Stamp (Date received): Blank.

State of Washington,

County of King—ss.

Name of taxpayer or purchaser of stamps: Henry F. Waechter, Hazel Miller and William G. Waechter, Co-executors of the Estate of May Florence Waechter (deceased).

Business address: 918 Vance Building, Seattle, Washington.

Residence:

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Tacoma, Washington.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from, 19...., to, 19....

3. Character of assessment or tax: Estate tax.

4. Amount of assessment, \$2,641.24; dates of payment \$850.60 on 3/29/48; \$1,790.62 on 7/13/49.

5. Date stamps were purchased from the Government

6. Amount to be refunded, \$1,459.33.

7. Amount to be abated (not applicable to income, gift, or estate taxes) \$

8. The time within which this claim may be legally filed expires, under section 910 of Internal Revenue Code on July 13, 1952.

The deponent verily believes that this claim should be allowed for the following reasons: This claim is based on the overpayment of so much of the estate tax paid as is attributable to the inclusion in decedent's gross estate of one-half of the cash surrender value (\$10,642.38) of insurance policies in the name of the surviving spouse as assured.

(See attached sheets for statement of reason for allowance of Claim.)

/s/ HENRY F. WAECHTER,

HAZEL WAECHTER MILLER
(Dumett),

WILLIAM G. WAECHTER,

Co-executors of the Estate of May Florence
Waechter, Deceased.

Subscribed and sworn to before me this 23 day
of August, 1949.

JOSEPH J. LANZA,
Notary Public.

The insurance policies involved herein were all carried upon the life of Henry Waechter, the surviving spouse, and are identified as follows:

United States of America

Amount of Policy	Name of Company	No. of Policy	Date of Policy	Beneficiary	Cash Value as of 2/20/47
\$ 3,000.00	Equitable Life Co.	1196536	1/14/03	May F. Waechter if living, but if not, to William G. Waechter and Hazel B. Miller equally, or survivor, and should neither survive, to assured's estate	\$ 2,420.00
\$25,000.00	New York Life Co.	6320634	8/ 6/18	May F. Waechter and after death to Hazel B. Miller and Gerry Waechter, share and share alike, or survivor.....	\$15,244.75
\$ 4,000.00	Equitable Life Co.	1337670	5/11/04	May F. Waechter or estate of insured....	\$ 3,620.00
Total Cash Surrender Value.....					\$21,284.75

Said policies were taken out during the married life of the insured and decedent, and all premiums thereon were paid entirely from community funds down to the date of Mrs. Waechter's death, and on that date, the policies were in full force and effect.

None of the policies have been surrendered, and none of the beneficiaries of decedent's estate have received any payments on account of the cash surrender value thereof at the date of decedent's death.

Petitioners content that as the insurance taken out by the surviving spouse was not on the life of the decedent wife, and that as none of the amounts here involved have been received by the executors or any heir or beneficiary of the decedent, no part of the cash surrender value thereof is includable as part of the gross estate of decedent for federal estate tax purposes.

The policies here involved were all payable upon the death of the insured husband, and nothing whatsoever became payable on the death of the wife beneficiary. So far as the cash surrender value thereof is concerned, it is merely a potential asset, and does not become an actual asset until the money is reduced to possession by surrender and cancellation of the policy. Even though such a potential asset may be considered "property" it is not that type of "property" in which any interest therein can be said to pass upon the death of the wife. Whatever may be realized by anyone on the cash surrender value is acquired solely by virtue of the contract between the insurer and the insured, and not by virtue of the death of the decedent wife.

Congress manifested its intent not to consider such interest taxable by specifically providing for the taxation of insurance on decedent's life. (Sec. 811 (g) (I.R.C.) It did not provide that the cash surrender value of a policy on the life of a living person should be subject to an estate tax. If Congress had desired to impose a tax upon such value, as part of the estate of a deceased beneficiary, it would have been easy to express that intent in the statute which it enacted.

On similar facts, the Supreme Court of the State of Washington has ruled that no part of the cash surrender value of insurance policies on the life of the surviving spouse, are taxable for inheritance tax purposes, since such property does not pass by will or by statutes of inheritance, nor constitutes

“insurance payable upon the death of any person.”
In re Martha Knight’s Estate, 131 Wash. Dec. page
758 (decided November 8, 1948).

While the federal estate tax is neither a property nor an inheritance tax, but is an excise tax, nevertheless, the tax is imposed only upon the “transfer” of property or interest therein at the death of the owner, and with respect to insurance, only upon the proceeds payable upon the death of the insured.

Since therefore, no part of the cash surrender value of such policies was “transferred” by the death of the wife beneficiary, it should not have been included as part of her gross estate and taxable to the extent of one-half of the value thereof. By including such an interest, the total tax assessed amounted to \$2,530.66, to which there was added and collected \$110.58 on account of interest, making a total of \$2,641.24 which was paid by the executors herein. By excluding one-half of the cash surrender value amounting to \$10,642.38, the correct tax should have been \$1,160.57 plus interest of \$21.34, making a total of \$1,181.91. The difference between the total amount paid and the correct amount is \$1,459.33, for which this claim is made.

The estate tax return was filed herein by the Executors on March 19, 1948, and said Executors are still acting as such in this estate.

[Endorsed]: Filed April 6, 1950.

[Title of District Court and Cause.]

ANSWER

The defendant, United States of America, by J. Charles Dennis, United States Attorney, for an answer to the plaintiff's complaint herein admits, denies and alleges as follows:

I.

The allegations in paragraph numbered I are admitted.

II.

The allegations in paragraph numbered II are admitted, except that it is denied that the taxes were erroneously or illegally assessed or collected.

III.

The allegations in paragraph numbered III are admitted.

IV.

The allegations in paragraph numbered IV are admitted.

V.

The allegations in paragraph numbered V are admitted, except that it is alleged that the estate tax return was filed on March 22, 1948, instead of on March 19, 1948, as alleged herein.

VI.

The defendant has no knowledge or information sufficient to form a belief to the truth of the averments in paragraph numbered VI.

sioner of Internal Revenue and collected as an estate tax by the Collector of Internal Revenue at Tacoma, Washington; that the amount of claim involved herein does not exceed \$10,000.00; and this Court has jurisdiction of the subject matter of this action under Judicial Code Section 24, as Amended, and U.S.C.A. Title 28, Secs. 1340 and 1346.

III.

The death of May Florence Waechter occurred on February 20, 1947, while she was a resident of Seattle, King County, Washington.

IV.

Plaintiffs were appointed co-executors of the Will and Estate of said May Florence Waechter by order entered on the 4th day of April, 1947, by the Superior Court of the State of Washington in and for King County; and at all times since have continued to be and act as the fully authorized executors of the said Will and Estate.

V.

On March 22, 1948, plaintiffs, acting as such executors, filed with the Collector of Internal Revenue, at Tacoma, Washington, the estate tax return on behalf of said estate of May Florence Waechter, deceased. That there was included in said return as part of the gross estate of decedent one-half the cash surrender value of the following insurance policies which were all carried upon the life of Henry Waechter, the surviving spouse, and are identified as follows:

Amount of Policy	Name of Company	No. of Policy	Date of Policy	Beneficiary	Cash Value as of 2/20/47
\$ 3,000.00	Equitable Life Co.	1196536	1/14/03	May F. Waechter if living, but if not, to William G. Waech- ter and Hazel B. Miller equally, or survivor, and should neither survive, to assured's estate	\$ 2,420.00
\$25,000.00	New York Life Co.	6320634	8/ 6/18	May F. Waechter and after death to Hazel B. Miller and Gerry Waechter, share and share alike, or survivor.....	\$15,244.75
\$ 4,000.00	Equitable Life Co.	1337670	5/11/04	May F. Waechter or estate of insured....	\$ 3,620.00
Total Cash Surrender Value.....					\$21,284.75

VI.

That the said policies were taken out during the married life of the insured and the decedent; the premiums on the policies were paid from community funds down to the date of May F. Waechter's death, and on that date the policies were in full force and effect and had not been surrendered or any payments received on account of the cash surrender value thereof.

VII.

That in the estate tax return referred to in paragraph V, above, said executors reported a gross estate of \$77,480.25 and a tax liability of \$850.62, which amount accompanied the return. In the assets listed in that return under Schedule F was included, as stated in paragraph V, the cash surrender value of the insurance policies reported as

\$10,642.38. Upon the audit of such return, the investigating officer recommended assessment of a deficiency in the amount of \$1,680.04 due to certain additions to income and disallowance of deductions, neither of which is at issue in the present action. That said deficiency was assessed in June, 1949, and was paid by the estate with interest in the amount of \$110.58 on July 6, 1949.

VIII.

That on August 24, 1949, plaintiffs, as such executors, filed timely refund claim in the amount of \$1,459.33 based upon the alleged overpayment of the estate tax in that amount due to inclusion in decedent's gross estate of one-half of the surrender value of the insurance policies heretofore referred to above.

IX.

That six months since the filing of said claim having expired and the Commissioner of Internal Revenue having neither allowed nor disallowed the said claim, this action was timely instituted.

It is further stipulated and agreed that this case involves the following questions:

Whether one-half the cash surrender value of life insurance policies on the life of decedent's husband was properly included in decedent's gross estate for Federal estate tax purposes.

Statutes Involved

Internal Revenue Code—Section 811(e)(2), added by section 402(b) (2) of the Revenue Act of

1942, as applicable to estates of decedents dying after October 21, 1942, and on or before December 31, 1947, (Regulations 105, sec. 81.23), provides as follows:

Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States——

* * *

(e) Joint and Community Interests.——

* * *

(2) Community interests.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

Remington Revised Statutes of Washington

Sec. 1342. Descent of community property.

Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. * * *

Sec. 6892. Community property defined—Husband's control of personalty.

Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

Plaintiffs' Contentions

Plaintiffs contend that as the insurance taken out by the surviving spouse was not on the life of the decedent wife, and that as none of the amounts here involved have been received by the executors or

any heir or beneficiary of the decedent, no part of the cash surrender value thereof is includable as part of the gross estate of decedent for federal estate tax purposes.

Congress manifested its intent not to consider such interest taxable by specifically providing for the taxation of insurance on decedent's life. Sec. 811(g) (I.R.C.) It did not provide that the cash surrender value of a policy on the life of a living person should be subject to an estate tax. If Congress had desired to impose a tax upon such value, as part of the estate of a deceased beneficiary, it would have been easy to express that intent in the statute which it enacted.

On similar facts, the Supreme Court of the State of Washington has ruled that no part of the cash surrender value of insurance policies on the life of the surviving spouse, are taxable for inheritance tax purposes, since such property does not pass by will or by statutes of inheritance, nor constitutes "insurance payable upon the death of any person." *In re Martha Knight's Estate*, 31 Wn.(2d) p.

While the federal estate tax is neither a property nor an inheritance tax, but is an excise tax, nevertheless, the tax is imposed only on the "transfer" of property or interest therein at the time of the death of the owner, and with respect to insurance, only upon the proceeds payable upon the death of the insured.

Defendant's Contentions

The defendant contends that the plaintiffs, in their Federal estate tax return as filed, properly included in the gross estate of the decedent one-half the cash surrender value of the certain life insurance policies on the life of the decedent because:

1. Under the laws of the State of Washington and the decisions of its Supreme Court, the cash surrender value of such life insurance policies is community property where the premiums have been paid from community funds, and inclusion of one-half the cash surrender value thereof is required under Sec. 811 of the Internal Revenue Code, *supra*.

It is further stipulated and agreed that the right of either party is reserved to introduce additional evidence, not inconsistent with the facts herein stipulated.

/s/ JOSEPH J. LANZA,
EGGERMAN, ROSLING &
WILLIAMS,
Attorneys for Plaintiffs.

/s/ J. CHARLES DENNIS,
/s/ THOMAS R. WINTER,
Attorneys for Defendant.

[Endorsed]: Filed March 9, 1951.

[Title of District Court and Cause.]

MEMORANDUM DECISION

Appearances:

For Plaintiffs:

EGGERMAN, ROSLING & WILLIAMS,
RALPH J. LANZA,
Seattle, Washington.

For Defendant:

J. CHARLES DENNIS,
United States Attorney.
THOMAS R. WINTER,
Assistant U. S. Attorney,
Seattle, Washington.

Yankwich, District Judge:—

The above-entitled cause, heretofore tried, argued and submitted, is now decided as follows:

Judgment will be for the plaintiff as prayed for in the Complaint, the exact amount to be computed by the parties.

Judgment and Findings to be prepared by counsel for the Plaintiff, unless counsel should agree that the stipulated statement of facts take the place of Findings, in which event only Conclusions of Law and Judgment need be filed under Local Rule 26.

Comment

At the time of her death, May F. Waechter was the beneficiary of three insurance policies taken out by her surviving husband, Wm. G. Waechter, during her lifetime. Briefly described, they were as follows:

Amount of Policy	Name of Company	No. of Policy	Date of Policy	Beneficiary	Cash Value as of 2/20/47
\$ 3,000.00	Equitable Life Co.	1196536	1/14/03	May F. Waechter if living, but if not, to William G. Waech- ter and Hazel B. Miller equally, or survivor, and should neither survive, to assured's estate	\$ 2,420.00
\$25,000.00	New York Life Co.	6320634	8/ 6/18	May F. Waechter and after death to Hazel B. Miller and Gerry Waechter, share and share alike, or survivor.....	\$15,244.75
\$ 4,000.00	Equitable Life Co.	1337670	5/11/04	May F. Waechter or estate of insured....	\$ 3,620.00

Up to the time of her death, the premiums for the policies were paid out of the community funds of herself and her husband. Her executors, on March 22, 1948, filed an estate tax return which included as a part of the gross estate the total cash surrender value of the policies, amounting to \$21,284.75. The Collector assessed a deficiency on one-half of the cash surrender value of the policies in the amount of \$1459.33, which was paid. Timely claim for refund having been refused, this action was instituted.

The problem before the Court is whether the tax was due. It is the Government's contention that the community interest in the insurance policy was liable for the tax under Section 811(e)(2) of the Internal Revenue Code (26 U.S.C.A., Sec. 811(e)(2)).

We cannot agree.

Estate taxes are imposed because a transfer of

an estate occurs upon a person's death. Knowlton v. Moore, 1900, 178 U. S. 41, 56, 59; Heiner v. Donnan, 1932, 285 U. S. 312; Helvering v. St. Louis Trust Co., 1935, 296 U. S. 39, 41.

Under the law of the State of Washington, the wife has an interest in everything acquired by the husband with community funds. (Remington, Revised Statutes of Washington, Sec. 1342.) The husband has control of the personalty. (Remington, Revised Statutes of Washington, Sec. 6892.) Under the terms of the policies of insurance, the husband has the right to change the beneficiary. And, while in making such change, he cannot give away the proceeds to strangers, (Occidental Life Ins. Co. v. Powers, 1937, 192 Wn. 475, 74 P(2) 27; King v. Prudential Ins. Co., 1942, 13 Wn.(2) 414, 125 P(2) 282) he may, without the consent of his wife, change the beneficiary from his wife to his estate. (In re Towey's Estate, 1945, 22 Wn(2) 212, 155 P(2) 273.) However, the protection which is thus extended against an unauthorized disposition of the wife's interest in an insurance policy does not make the interest of the wife in a policy in which she is the beneficiary "property which passes by will or by a statute of inheritance." (In re Knight's Estate, 1949, 31 Wn(2) 813, 199 P(2) 89, 94.) In the case of policies payable on the death of an insured, who is the surviving spouse, "nothing whatever became payable on the death of the beneficiary, the deceased wife." (In re Knight's Estate, *supra*, p. 941.)

The language just quoted was used in a case

arising under the inheritance tax statute of the State of Washington. But the logic of the reasoning applies with equal force to the estate tax. To be taxable, a transfer of an estate must occur. And if, as it appears, the wife had no power to transfer one-half of her surrender value in the policy, and upon her death, nothing became due to her heirs, there is no interest to which the estate tax would attach. The same result is reached if we approach the problem from another angle. The duty to pay the estate tax devolves upon the executor (26 U.S.C.A., Secs. 822, 825. Severe penalties are imposed for failure to perform this duty. (26 U.S.C.A., Sec. 145), in addition to distraints against the estate. (26 U.S.C.A., Secs. 826-827.)

Recently in my home District, executors were actually prosecuted for attempt to evade the estate tax by failing to make a proper return. (*United States v. Cole*, 1950, D.C. Cal., 90 F. Supp. 1471.)

Under Washington law, the executor is given the right to the possession or management of all the real and personal property of the deceased, and to receive the rents and profits of the real estate until the estate is settled. (Remington, Revised Statutes, Sec. 1464.) It is made his duty, within one month after his appointment, to return a true inventory of "all the property of the estate which shall have come into his hands," and to apply to the Court for the appointment of appraisers to appraise the property so inventoried. (Remington, Revised Statutes, Sec. 1465.)

In the case of a life insurance policy upon the life of the husband, there is no provision in the law of the State of Washington for liquidating any interest which the wife may have had in the property. Granted that the policy has a possible cash surrender value, there is no provision in law for reducing it to the possession or control of the wife's executor. He cannot compel the husband to cancel the policy, in order that its surrender value might be equally divided between the estate and the husband. And the surrender value remains in the realm of possibility, unless there be power to compel surrender. So that, if the contention of the Government be correct, we would have the anomaly to which I referred at the trial, that of requiring the executor to pay a tax on property which has not come into, and which he cannot reduce, to his possession, under penalty of subjecting the estate to heavy civil penalties, and himself to criminal prosecution, if he willfully avoids doing so.

Granted that the Congress has power to exact taxes in cases where no transfer occurs in contemplation of state law, the fact remains that the only basis for any claim by the Government in this case is the community property law of the State of Washington. (See, *DeLappe v. Commissioner*, 1940, 5 Cir., 113 F(2) 48.) As already appears, that law provides no method for separating from the value of the policy the portion belonging to the wife so as to incorporate it into her estate and subject it to estate tax upon her death. The case of *Carroll*,

1933, 29 B.T.A. 11, is not convincing. It is based on Louisiana law. The policy was payable to the husband's estate. The Board took the view that, under Louisiana law, one-half of the surrender value of the policy automatically became a part of the wife's estate upon her death. But the Knight case, decided under Washington law, distinctly holds that in Washington, upon the death of the wife, no estate passes to her heirs. And, as we are interpreting Washington law, this decision is binding on us. (See, *DeLappe v. Commissioner*, supra.)

In what precedes, we have already indicated other reasons why, under this law, a different conclusion is commanded. It should be added that the view here reached finds support in the cases holding that a decedent's gross estate does not include "property subject to an unexercised general power." (See, *Helvering v. Safe Deposit Co.*, 1942, 316 U. S. 56, 62; *Porter v. Commissioner*, 1933, 288 U. S. 436; *Lehman v. Commissioner*, 1940, 2 Cir., 109 F(2) 99; *Estate of Royce*, 1942, 46 B.T.A. 1090.) And, at best, the wife possessed only the power, in her lifetime, to prevent an unauthorized change of beneficiary. (*California-Western States Life Ins. Co. v. Jarman*, 1947, 29 Wn(2) 98, 185 P(2) 494.)

Hence the ruling above made.

Dated this 9th day of July, 1951.

/s/ LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed July 9, 1951.

[Title of District Court and Cause.]

STIPULATION THAT STIPULATED STATE-
MENT OF FACTS SHALL TAKE THE
PLACE OF FINDINGS

It Is Hereby Stipulated by and between plain-
tiffs and defendant, through their undersigned at-
torneys of record that the stipulated statement of
facts on file herein shall take the place of findings
of fact, and that the court may enter only conclu-
sions of law and judgment herein.

EGGERMAN, ROSLING &
WILLIAMS,

/s/ JOSEPH J. LANZA,
Attorneys for Plaintiffs.

/s J. CHARLES DENNIS,
/s/ THOMAS R. WINTER,
Attorneys for Defendant.

[Endorsed]: Filed August 8, 1951.

[Title of District Court and Cause.]

CONCLUSIONS OF LAW

This matter having come on regularly for trial
before the undersigned judge of the above-entitled
court on March 13, 1951, upon a stipulated state-
ment of facts on file herein, and the respective
parties having stipulated that the said stipulated
statement of facts shall take the place of findings
of fact, and the court having considered the argu-

ment of counsel and the written briefs submitted by the respective parties herein, and the court having filed its memorandum decision, now, therefore, from said stipulated statement of facts, the court draws the following:

Conclusions of Law

1. That one-half the cash surrender value of the life insurance policies on the life of decedent's husband, was not properly included in decedent's gross estate for federal estate tax purposes.

2. That plaintiffs are entitled to judgment against defendant in the sum of \$1,459.33, with interest thereon at the rate of six per cent per annum from July 13, 1949, to the date of the entry of judgment herein and for plaintiffs' costs herein to be taxed.

Dated this 6th day of August, 1951.

/s/ LEON R. YANKWICH,
United States District Judge.

Presented by:

/s/ JOSEPH J. LANZA,
Of Attorneys for Plaintiffs.

Approved as to Form for Entry:

/s/ THOMAS R. WINTER,
Of Attorneys for Defendant.

[Endorsed]: Filed August 8, 1951.

In the United States District Court, Western
District of Washington, Northern Division

No. 2513

HENRY S. WAECHTER, HAZEL MILLER and
WILLIAM T. WAECHTER, Co-Executors of
the Estate of MAY FLORENCE WAECH-
TER, Deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter having come on regularly before the undersigned judge of the above-entitled court on the day of July, 1951, for the entry of judgment pursuant to the conclusions of law entered this date, now, therefore, pursuant to said conclusions, it is hereby

Ordered, Adjudged and Decreed that plaintiffs, Henry S. Waechter, Hazel Miller and William T. Waechter, co-executors of the Estate of May Florence Waechter, deceased, be and they are hereby granted judgment against defendant, United States of America in the sum of \$1,459.33, with interest thereon at the rate of six per cent per annum from July 13, 1949, to the date of this judgment and for plaintiffs' costs herein to be taxed.

Dated this 6th day of August, 1951.

/s/ LEON R. YANKWICH,
United States District Judge.

Presented by:

/s/ JOSEPH J. LANZA,
Of Attorneys for Plaintiffs.

Approved as to Form for Entry:

/s/ THOMAS R. WINTER,
Of Attorneys for Defendant.

[Endorsed]: Filed and entered August 8, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Henry S. Waechter, Hazel Miller and William T. Waechter, Co-Executors of the Estate of May Florence Waechter, Deceased, Plaintiffs Named Above, and Eggerman, Rosling & Williams, Attorneys for Plaintiffs:

You, and Each of You, will please take notice that the defendant, United States of America, appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on August 8, 1951.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

[Endorsed]: Filed October 3, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said Cause. The papers herewith transmitted constitute the record on appeal from the final judgment filed in said cause on August 8, 1951, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

1. Complaint, filed Apr. 6, 1950.
2. Praecipe for Issuance of Summons, filed Apr. 6, 1950.
3. Summons, filed Apr. 7, 1950.
4. Stipulation extending time to Aug. 4, 1950, to answer, filed June 9, 1950.
5. Stipulation extending time to Sept. 5, 1950, to answer, filed Aug. 3, 1950. (Additional Time.)
6. Answer, filed Sept. 7, 1950.

7. Trial Brief for the United States, filed Mar. 9, 1951.
8. Stipulation that facts are admitted, filed Mar. 9, 1951.
9. Plaintiff's Brief, filed Mar. 26, 1951.
10. Stipulation extending time to May 1, 1951, in which to file reply brief, filed Apr. 11, 1951.
11. Order granting extension of time, filed Apr. 19, 1951.
12. Supplemental Brief for the United States, filed May 1, 1951.
13. Memorandum Decision, filed July 9, 1951.
14. Stipulation that Stipulated Statement of Facts Shall Take the Place of Findings, filed Aug. 8, 1951.
15. Conclusions of Law, filed Aug. 8, 1951.
16. Judgment, filed Aug. 8, 1951.
17. Notice of Appeal, filed Oct. 3, 1951.

I certify that the following is a true and correct statement of all expenses, costs, fees, and charges incurred in my office for preparation of the record on appeal herein on behalf of defendant, to wit:

Notice of Appeal.....\$5.00,

and that this amount has not been paid to me for the reason that the appeal herein is being prosecuted by the United States of America.

In Witness Whereof I have hereunto set my hand

and affixed the official seal of said District Court of Seattle, this 6th day of November, 1951.

[Seal]

MILLARD P. THOMAS,

Clerk,

By /s/ TRUMAN EGGER,

Chief Deputy.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Comes now the United States by and through its attorney, J. Charles Dennis, United States Attorney, and designates the following to be included in the record on appeal in the above-entitled action:

1. Complaint.
2. Answer.
3. Stipulated Statement of Facts.
4. Stipulation that Stipulated Statement of Facts shall take the place of Findings.
5. Conclusions of Law.
6. Judgment.
7. Notice of Appeal.
8. This Designation of Record.

/s/ J. CHARLES DENNIS,

United States Attorney.

[Endorsed]: Filed November 21, 1951, U.S.D.C.

[Endorsed]: Filed November 26, 1951, U.S.C.A.

[Endorsed]: No. 13153. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Henry S. Waechter, Hazel Miller and William T. Waechter, Co-Executors of the Estate of May Florence Waechter, deceased, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 8, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13153

UNITED STATES OF AMERICA,
Appellant,

vs.

HENRY S. WAECHTER, HAZEL MILLER and
WILLIAM T. WAECHTER, Co-Executors of
the Estate of MAY FLORENCE WAECH-
TER, Deceased,

Appellee.

STATEMENT OF POINTS

Comes now the United States by and through its
attorney, J. Charles Dennis, United States Attor-

ney, and represents to this Court that the following are the points to be relied upon by the appellant in its appeal:

That the lower court committed reversible error when it held "That one-half the cash surrender value of the life insurance policies on the life of decedent's husband was not properly included in the decedent's gross estate for federal estate tax purposes.

/s/ J. CHARLES DENNIS,
United States Attorney.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 23, 1951.

